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83-1715

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. _____

RICHARD GAJEWSKI, Petitioner,

v.

COMMISSIONER OF
INTERNAL REVENUE, Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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March 14, 1984

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Question Presented

Whether minimal standards should be pre-set to determine whether an individual's full time method of earning a legal livelihood can be considered a "trade" or "business" for purposes of filing an IRS return; or should each case be determined on its individual merits based upon the trier of fact's assessment of the "facts and circumstances" in each case presented.

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The petitioner Richard Gajewski respectfully prays that a writ of certiorari issue to review the judgment

and opinion of the United States Court of Appeals for the Second Circuit in this proceeding on December 15, 1983.

Opinion Below

The opinion of the Court of Appeals appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered December 15, 1983 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

Statement of the Case

The facts of the case below have

been stipulated and appear on pages 609, 610, 611 and 612 of the opinion of the U.S. Court of Appeals for the Second Circuit, attached to this petition as Appendix I.

In brief summary, taxpayer-petitioner Gajewski, a full time gambler during the years 1976 and 1977, sought to avoid imposition of a minimum tax on tax preferences as set forth in 26 USC 56, by taking his entire gambling losses as business-expense deductions on Schedule A of his IRS return. The Commissioner assessed deficiencies, claiming that gambling losses are itemized deductions subject to minimum tax on tax preferences. Petitioner sought relief from the U.S. Tax Court.

The Tax Court, having adopted a "facts and circumstances" test in Ditunno v. Commissioner, 80 T.C. 362 (1983), overruled Gentile v. Commissioner, 65 T.C. 1 (1975), which case had been interpreted as meaning that, in order to be engaged in a trade or business one had to hold oneself out as providing goods or services to others. After a review of the facts and circumstances of the instant case, the Tax Court, citing Ditunno, determined that the petitioner was engaged in a trade or business and that therefor his gambling losses were not subject to the minimum tax.

The Commissioner appealed to the Second Circuit which Court reversed, finding that a "facts and circumstances

test" is a "misnomer" and a "non-test." (Appendix at 616) The Second Circuit replaced the "facts and circumstances test" of Ditunno with the "goods or services test" of Gentile.

Reasons for Granting the Writ

THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE OF HIGGINS V. COMMISSIONER, 312 U.S. 212 (1941), AS TO THE SCOPE OF EVIDENCE TO BE CONSIDERED IN DETERMINING WHETHER A TAXPAYER IS ENGAGED IN A TRADE OR BUSINESS.

Section 62(1) of Title 26 of the United States Code provides in part that trade and business expenses may be deducted from gross income in order to arrive at an individual's adjusted gross

income.

In Higgins, this Court determined that the review of all facts and circumstances of an individual's situation determined whether he was engaged in trade or business, essentially ruling that the trier of fact, after reviewing all the pertinent facts presented, was best able to determine a taxpayer's status in this regard. In Higgins the Court did not set any minimum standards that must be met in order to conclude that a taxpayer is engaged in a trade or business, although presented with the opportunity to do so.

The Second Circuit, in overruling Ditunno, attempts to reconcile its reliance on "goods or services" with

Higgins, but by its own wording accepts the "facts and circumstances test" as the determinant in that ruling. Stating "In that case (Higgins) the facts and circumstances were . . . ." (Appendix at 616) The Second Circuit notes that "the Court held that his maintenance of records and collection of interest and dividends did not amount to the carrying on of a trade or business." (Appendix at 617) The Second Circuit thus recognized that this Court in Higgins did rely on the facts and circumstances presented to it to determine the status of the taxpayer.

Similarly, the Second Circuit relies upon Justice Frankfurter's concurring opinion in Deputy v. DuPont, 308 U.S. 488 (1940), but fails to

recognize that Higgins, decided one year after DuPont, dealt with the principle of earlier promulgated definitions. Referring to a definition of "Business" as set forth in Flint v. Stone Tracy Company 220 U.S. 107, 171 (1911) it stated, "A definition given for such an issue is not controlling in this dissimilar inquiry." (Higgins at 217) This Court thus noted that dissimilar issues frequently bring about different definitions of what is, or is not, "engaging in a trade or business." The issues in DuPont differ greatly from the matters in Ditunno, where a Minimum Tax issue presents, or with the instant matter, where a taxpayer may be subject to tax on a negative income.

Additionally, by invading the

prerogatives of the trier of fact by setting pre-determined standards, the Second Circuit limits the scope of inquiry for determinating who is and who is not engaged in a trade or business. Gentile itself stands for a review of all the "facts and circumstances," stating that "whether a particular taxpayer's activities amount to the carrying on a trade or business is essentially a factual determination." (Gentile at page 4) In Gentile, a review of the facts resulted in a determination that the petitioner was not carrying on a trade or business. A review of the facts in the instant matter resulted in a decision by the trier of fact (U.S. Tax Court) that the petitioner was engaged in a trade or

business.

The Second Circuit's erroneous reading of Higgins and of Justice Frankfurter's opinion in DuPont not only materially changed the principle laid down by this Court in Higgins, and invaded the prerogatives of subsequent triers of fact by limiting the scope of inquiry permitted to determine a taxpayer's status if he did not meet this arbitrary minimum standard. Whatever other circumstances or facts the trier of fact finds that might outbalance the importance of these pre-determined minimum standards, it will not be permitted to find that a taxpayer is engaged in a trade or business unless he meets these pre-determined minimum standards. If he

fails in these arbitrary matters he is not permitted to deduct business expenses from his gross income.

It has long been recognized that the trier of fact is best able to judge which facts are most relevant to determine which of two or more opposing positions shall be deemed to have carried the day in a dispute. To limit that prerogative is to limit the ability of the trier of fact to get at the truth and to reach a conclusion that is in harmony with the intent of the law to be applied.

The ruling of the Court below places unnecessary restrictions on the latitude rightfully belonging to the trier of fact. It also substantially strays from the principle of Higgins.

This Court should, therefor, determine whether arbitrary restrictive standards should be allowed to bind the trier of fact. Clearly, the Tax Court (Ditunno at 366) wishes to be permitted latitude in weighing all of the facts and circumstances presented to it in reaching a conclusion in such matters.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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